UNITED
NATIONS

AT

Administrative Tribunal

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ADMINISTRATIVE TRIBUNAL

Judgement No. 518

Case No. 554: BREWSTER

Against: The Secretary-General
of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Ahmed Osman, Vice-President, presiding; Mr. Arnold Kean; Mr. Ioan Voicu;

Whereas, at the request of Havelock Ronald Brewster, a staff member of the United Nations Conference on Trade and Development, hereinafter referred to as UNCTAD, the President of the Tribunal, with the agreement of the Respondent, successively extended to 31 January and 30 June 1990, the time-limit for the filing of an application to the Tribunal;

Whereas, on 6 June 1990, the Applicant filed an application containing the following pleas:

"II. Pleas

(1) The Applicant requests the Tribunal, as a preliminary measure, to call the following persons as witnesses;

...

(2) The Applicant requests the Tribunal:

(a) To find that the 'functional title' and 'level' of the post occupied by the Applicant from 15 September 1985 to 8 March 1990 was 'Director of the Commodities Division' and D-2 respectively;

(b) To order the Secretary-General of the United Nations to send to the Applicant a formal acknowledgement of the fact that a satisfactory procedure had not been followed in removing the Applicant from his post of Chief, Development and General Studies Branch, Commodities Division and assigning him as Chief, Structural Adjustment and Trade Expansion Branch, Manufactures Division;

(c) To order the Secretary-General of the United Nations in the same communication to express regret that 'a letter from the former Under-Secretary-General for Administration and Management to the then UNCTAD Officer-in-Charge, dated 25 July 1985, had been placed in the Applicant's personnel file at UNCTAD without his knowledge'.

(3) The Applicant requests the Tribunal to fix compensation in the amount of one year's salary for acute mental injury sustained over a protracted period of time, from 5 June 1985, to the present time."

Whereas the Respondent filed his answer on 21 December 1990,

Whereas the Applicant filed written observations on 28 January 1991,

Whereas, on 1 May 1991, the President of the Tribunal ruled that no oral proceedings would be held in the case,

Whereas the facts in the case are as follows:

The Applicant entered the service of UNCTAD on 1 July 1968, on a one-year fixed-term appointment as an Economic Affairs Officer at the P-3 level. He separated from the service of UNCTAD in June 1969, upon the expiration of his fixed-term appointment. On 3 June 1973, the Applicant re-entered the service of UNCTAD as an Economic Affairs Officer at the P-4 level, in the Division for Economic Cooperation among Developing Countries. On 1 February 1975, he was granted a probationary appointment and on 1 February 1976, a permanent appointment. On 5 September 1977, the Applicant was reassigned, within UNCTAD, to the Commodities Division, as an advisor to Mr. Alister McIntyre, the new Director of the Division. On 1 April 1978, he was promoted to the P-5 level and his functional title was

changed to Senior Economic Affairs Officer. On 1 April 1982, the Applicant was promoted to the D-1 level, as Chief, Development and General Studies Branch, Commodities Division.

In a memorandum dated 11 June 1985, Mr. McIntyre, then Deputy Secretary-General and Officer-in-Charge of UNCTAD, announced the "redeployment and consequential reassignment of staff members within the UNCTAD Secretariat". The Applicant was among the staff reassigned, having been informed by the UNCTAD Administration some five days prior to the issuance of the memorandum that he would be so reassigned, effective 1 July 1985, to the post of Chief, Structural Adjustment and Trade Expansion Branch, Manufactures Division.

In a cable dated 3 July 1985, the Applicant informed the Secretary-General that he would be requesting administrative review of UNCTAD's decision to reassign him. On 25 July 1985, the Applicant met with the Under-Secretary-General for Administration and Management to discuss the reassignment of staff in UNCTAD. Also on 25 July 1985, the Under-Secretary-General for Administration and Management wrote a personal and confidential letter to Mr. McIntyre, recording his account of the meeting with the Applicant; the letter was placed in the Applicant's personnel file. The Applicant set forth his version of the meeting in a memorandum dated 20 September 1985, to the Under-Secretary-General.

On 22 September 1985, the Applicant requested the Secretary-General to review the administrative decision to reassign him within UNCTAD.

The Applicant also filed a complaint with the Panel on Discrimination and Other Grievances in the UN Secretariat (Panel on Discrimination). On 5 March 1986, the Co-ordinator of the Panel on Discrimination transmitted its findings on the Applicant's case to the Assistant Secretary-General for Personnel Services. It recommended that:

> "(1) ... that UNCTAD institute 'monthly meetings' as suggested in ST/GB/206 especially if further redeployments are envisaged."
>
> and
>
> "(2) ... since the versatility of Mr. Brewster is widely recognized in UNCTAD that he be given priority for any vacant positions within his area of expertise."

Not having received a reply from the Secretary-General to his request for review, the Applicant lodged an appeal with the Joint Appeals Board (JAB) on 11 April 1986.

On 15 September 1986, the Applicant was reassigned to his former Division (the Commodities Division) with the functional title of Officer-in-Charge.

On 16 January 1987, the parties agreed to enter into a conciliation proceeding that did not result in a mutually acceptable resolution of the Applicant's complaint. Consequently, the JAB pursued its consideration of the case. The Board adopted its report on 14 July 1989. Its considerations, conclusions and recommendations read in part as follows:

"Considerations, Conclusions and Recommendations

Receivability

32. The Panel first considered the issue of receivability and found that the appeal was receivable pursuant to staff rule 111.2.

Merits

...

39. Since the developments which occurred after 11 June 1985, date of the administrative decision contested by the Appellant, have not led to a solution to the case, the Panel has decided to concentrate on the principal issues identified in the appeal and which relate to the procedure adopted by UNCTAD in 1985 in the implementation of a major redeployment exercise which affected 39 staff members. The Panel is fully cognizant of the Secretary-General's right under staff regulation 1.2 to reassign staff within the Organization as necessary. It also believes, however, that proper personnel management procedures need to be observed. The Panel has reviewed very carefully the correspondence submitted by the Appellant and by the Respondent and has reached the conclusion that a satisfactory procedure was not followed in the reassignment of the Appellant in 1985. The Panel regrets that guidelines such as those contained in the Secretary-General's Bulletin ST/SGB/206 of 5 October 1984 and more particularly in its para. 4(c) were not taken into account.

40. The Panel, having identified the principal issue in this case, then addressed the claims of the Appellant which can be summarized as follows:

(a) To be appointed as a matter of priority to a position within his area of interest and expertise,

(b) to receive just compensation for fault of procedure and mental injury endured since June 1985, and

(c) to be reimbursed for legal costs.

41. In considering the claims of the Appellant, the Panel wishes to underline the fact that the notification of appealwas submitted to JAB on 24 December 1985, that more than 3 years have elapsed since then and nearly 4 years since the contested administrative decision was taken. The Panel is of the opinion that the delay may have occurred because the parties would have wished to reach a satisfactory solution of the case through conciliation. The Panel was entrusted with the case in September 1988 and its members were unanimously of the opinion that a conciliation had to be possible since:

(a) The personnel record of the Appellant is exemplary and shows that he has consistently discharged his functions in an outstanding way;

(b) The report of the Panel on Discrimination and Other Grievances recommended that he be given priority for any vacant positions within his area of expertise;

(c) The Secretary-General of UNCTAD indeed considered him for such a position and entrusted him with the direction of the Commodities Division on 15 September 1986.

42. The first claim of the Appellant has been partly met with his reassignment to the Commodities Division. The Panel, however, recommends that the UNCTAD Administration review immediately the terms of such assignment in relation to: (a) the functional title, and (b) the level of the post.

43. The Panel further recommends that, in relation to the second claim of the Appellant for compensation due to the non-observance of the consultation process outlined in para. 4(c) of ST/SGB/206, a formal acknowledgement of the fact that a satisfactory procedure had not been followed be addressed to him. The same communication should express regrets that a letter from the former USG [Under-Secretary-General] for Administration and Management to the then UNCTAD Officer-in-Charge, dated 25 July 1985, had been placed in his personnel file at UNCTAD without his

knowledge. The Panel deplores the existence of such 'personnel files' at UNCTAD, separate from the official ones, and points out that it is not in keeping with the terms of Circular IC/Geneva/3013 of 10 May 1983.

44. Finally, the Panel does not consider applicable the third request of the Appellant for reimbursement of legal costs."

On 21 November 1989, the Acting Under-Secretary-General for Administration and Management transmitted to the Applicant a copy of the Board's report and informed the Applicant that the Secretary-General, having re-examined his case in the light of the Board's report, had decided to maintain the contested decision on the following grounds:

"The Secretary-General, having re-examined your case in the light of the Board's report, has decided to maintain the decision to reassign you effective 1 July 1985, from the post of Chief, Development and General Studies Branch, Commodities Division, at the D-1 level, to that of Chief, Structural Adjustment and Trade Expansion Branch, Manufactures Division, at the same level, which occurred as part of an overall 1985 redeployment exercise. In this connection, it should be noted that the Secretary-General has a discretionary authority to reassign his staff to any of the activities or offices of the United Nations, in the interest of good administration. Furthermore, your reassignment took place after appropriate consultations with you in this regard on 5 and 6 June 1985, concerning such reassignment. You were also advised when the general redeployment was communicated to staff members on 11 June 1985, that any changes which did not develop positively would be reviewed in due course, with the affected staff.

The Secretary-General has also noted the Board's conclusion in paragraph 42 of its report. In this connection, your assignment to the Commodities Division as Officer-in-Charge, Office of the Director, effective 15 September 1986, against post no. E-D1-009-371 was consequent to the arrangements communicated to the staff by the UNCTAD Secretary-General on 3 September 1986, confirmed to you on 10 September 1986. With regard to the Board's observations in paragraph 43 of its report, it is regretted that a letter was placed in your personnel file without your prior knowledge. The necessary instructions are being given to UNCTAD to avoid the possibility of similar events in the future."

On 6 June 1990, the Applicant filed with the Tribunal the application referred to earlier.

Whereas the Applicant's principal contentions are:

1. The Applicant's "functional title" from 15 September 1985 to 8 March 1990, was "Director of the Commodities Division". The post he encumbered was at the D-2 level.

2. The Respondent should acknowledge that he did not follow satisfactory procedures in removing the Applicant from one post and assigning him to another.

3. The Respondent should formally express regret that a letter of 25 July 1985, from the Under-Secretary-General for Administration and Management to the then UNCTAD Officer-in-Charge, was placed in the Applicant's personnel file without his knowledge.

Whereas the Respondent's principal contention is:

The Respondent's decision to reassign the Applicant was a lawful exercise of the Respondent's discretionary authority under the Staff Regulations; it was not taken in violation of applicable decentralized staff management consultative procedures.

The Tribunal, having deliberated from 6 to 29 May 1991, now pronounces the following judgement:

I. Item (1) of the Applicant's pleas is the request that, as a preliminary measure, eleven named persons should be called by the Tribunal as witnesses. The President of the Tribunal ruled on 1 May 1991, that no oral proceedings would be held in this case. The Tribunal notes that the documentation is sufficient to enable this case to be decided without examination of witnesses.

II. Item (2) of the Applicant's pleas deals with matters of substance, sub-paragraph (a) requesting the Tribunal:

> "To find that the 'functional title' and 'level' of the post occupied by the Applicant from 15 September 1985 to 8 March 1990 were 'Director of the Commodities Division' and D-2 respectively".

The Tribunal notes that these matters were not formally submitted to the JAB and that the Respondent has therefore objected to their consideration by the Tribunal.

III. The substance of item 2(a) is, in any event, a matter solely within the discretion of the Respondent under staff regulation 1.2, and the Tribunal cannot substitute its own opinion for the decision of the Respondent, in the absence of some impropriety or irregularity proved by the Applicant.

IV. The Tribunal, however, observes with surprise that the Applicant remained as "Officer-in-Charge" (a title normally of temporary duration) at the D-1 level for a period of three-and-a-half years.

V. The gravamen of the Applicant's complaint is that he was moved to another post as part of a restructuring within UNCTAD which involved the movement of 39 senior officials. He asserts that this was done without the required consultation with the staff, a requirement which, according to the Applicant, rests upon two Bulletins issued by the Secretary-General to members of the staff of the United Nations, numbered respectively ST/SGB/172 (19 April 1979) and ST/SGB/206 (5 October 1984).

VI. The Applicant's assertion that his change of post was not accompanied by the required consultation is, however, denied by the Respondent, who claims that "discussions were in fact held with Applicant concerning his reassignment". The Applicant states in his application that on 5 June 1985, he was called to the office of the Deputy Secretary-General of UNCTAD in the presence of the Chief of Personnel of UNCTAD and informed that the Officer-in-Charge of UNCTAD had decided to transfer the Applicant to a new post with unspecified duties. On 6 June 1985, according to the Applicant, he was called to the office of the Officer-in-Charge of UNCTAD who, in the presence of the Chief of Administration of UNCTAD, repeated his decision "in an aggressive manner". On 7 June 1985, the Staff Coordinating Council requested the intervention of the Secretary-General's Office and the Office of Personnel Services at Headquarters and on 12 June 1985, the Officer-in-Charge of UNCTAD agreed to the Council's request to meet with him on the matter of the reassignments, which he had announced the previous day in a circular to all staff members. On 13 June 1985, the Executive Bureau of the Staff Coordinating Committee cabled the Respondent reporting, as the result of the meeting with the Officer-in-Charge, that there had been

"serious anomalies have resulted from his rather precipitate reassignment of staff, ... violation of established procedure and absence of consideration of career prospects and interests of the staff concerned ...". Following a further meeting with the Officer-in-Charge on 20 June 1985, the Executive Bureau of the Staff Coordinating Committee sent a cable, in terms similar to the previous cable to the UN Secretary-General, but addressed to the Under-Secretary-General for Administration and Management. At his request, the Applicant met the Under-Secretary-General at Headquarters in New York, in connection with the Applicant's transfer from his post.

VII. The question, therefore, arises whether the totality of the proceedings described in the previous paragraph amounted to the consultation required by ST/SGB/172 and ST/SGB/206, referred to in paragraph V. There is, so far as the Tribunal is aware, no definition in the Staff Regulations or Rules, or in the Tribunal's jurisprudence, of the concept of consultation, but on an ordinary construction, it would appear that the essential element is that each party to the consultation must have the opportunity to make the other party aware of its views, so that they can be taken into account in good faith. In a study prepared by the United Nations Secretariat (Juridical Yearbook, 1962 (prov.), fascile 2, page 279) it is stated that "consultation is a process by which the views of the parties consulted are merely sought or ascertained ...". This construction does not mean that the views of either party must necessarily prevail or that one side or the other must change its position.

VIII. Having examined the evidence, the Tribunal has reached the conclusion that the proceedings described in paragraph VI amounted to the required consultation, though the outcome was unsatisfactory to the Applicant. His objection was, in fact, to the outcome of the proceedings, rather than to the proceedings themselves, which in fact afforded the Applicant and the Staff Association adequate opportunity to express their views and to press them upon senior officers personally.

IX. It is true that paragraph 4(a) of ST/SGB/206, referred to in paragraphs V and VII, provides as follows:

> "The issue or policy should affect the entire department or office or at least a significant number of staff in a particular unit or service of the department or office. Individual cases as such should not normally be subject to consultation" (emphasis added).

However, from Judgement No. 136, Detière (1970), it appears that, the Respondent must pay due regard to the interest of the individual staff member, the Tribunal having indicated that, while recognizing the importance for the proper functioning of an organization (ICAO) of the right to transfer staff, it must be emphasized that in exercising that prerogative it is necessary to ascertain that the positions before and after the transfer were comparable and due regard is paid to the personal interest of the staff member concerned.

In a memorandum of 29 November 1983, addressed to all Directors and Chiefs of Programmes, the Chief of Personnel, Administrative Service, UNCTAD, drew attention to the foregoing obligation, as established by the jurisprudence of the Tribunal. In the present case, the Tribunal is satisfied that, in the proceedings described in paragraph VI, the Respondent's attention was fully drawn to this obligation, to which the Respondent did not fail to give effect.

X. Though not stated in the application, later documentation (based on a newspaper report) suggests that the decision to change the posts of 39 officials was improperly motivated by the political wishes of certain States. There is, however, no evidence to support this allegation of impropriety, and the Tribunal does not take it into account.

XI. The Applicant also put forward for consideration by the Panel on Discrimination and Other Grievances the suggestion that his removal to a new post amounted to discrimination against him personally. The Panel rejected this complaint and observed there was a direct conflict between the interests of the Applicant and the Organization.

XII. The Tribunal, for the foregoing reasons, rejects the request in paragraph (2)(b) of the Applicant's pleas for "a formal acknowledgment of the fact that a satisfactory procedure had not been followed" in moving the Applicant to a new post.

XIII. Item (2)(c) of the Applicant's pleas requests the Tribunal to order the Respondent to "express regret that 'a letter from the former Under-Secretary-General for Administration and Management to the then UNCTAD Officer-in-Charge, dated 25 July 1985, had been placed in the Applicant's personnel file at UNCTAD without his knowledge'". The Tribunal notes that regret was in fact expressed in a letter of 21 November 1989, written to the Applicant by the Acting Under-Secretary-General for Administration and Management.

XIV. In his plea (3) the Applicant requests the Tribunal to "fix compensation in the amount of one year's salary for acute mental injury sustained over a protracted period of time, from 5 June 1985, to the present time". The Applicant has not produced evidence that he has suffered the acute mental injury which he claims. The Tribunal therefore does not award him any compensation.

XV. The Tribunal has, after consideration, decided not to award a sum in respect of the Applicant's legal costs. It is not the practice of the Tribunal to award legal costs to an unsuccessful Applicant in the absence of special circumstances.

XVI. For the foregoing reasons, all pleas are rejected.

(Signatures)

Ahmed OSMAN
Vice-President, presiding

Arnold KEAN
Member

Ioan VOICU
Member

Geneva, 29 May 1991

Paul C. SZASZ
Acting Executive Secretary